A

BORNEO UNITED SAWMILLS SDN BHD

v.

MUI CONTINENTAL INSURANCE BHD

B

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH J
[NO: 22-45-2005-III]
12 SEPTEMBER 2008

C ***INSURANCE:*** *Marine insurance - Loss of goods - Claim for loss of goods under Marine Cargo Policy - All risk policy - Whether goods covered by policy - Whether vessel a classified vessel - Whether plaintiff involved in illegal importing/exporting - Whether cause of loss of goods related to competency of crew of vessel - Whether there was evidence that*
D *vessel unseaworthy - Whether there were breach of warranties by plaintiff - Whether plaintiff brought claim within terms of policy - Whether plaintiff's claim allowed*

The plaintiff's claim was for loss of goods in the sum of
E RM396,000 under a Marine Cargo Policy taken out with the defendant which disclaimed liability on the ground that the plaintiff had breached certain conditions of the policy rendering it unenforceable. The defendant by a Marine Cargo Policy (the policy) provided insurance coverage in respect of goods valued at
F RM400,000 carried on board motor vessel MV 'Kuasa Jaya No. 1' (the vessel). On or about 23 September 2003, the plaintiff alleged that the vessel carrying 428.4804 cubic meters of sawn timbers (goods) was sailing from Pontianak, Kalimantan, Indonesia and heading towards Sibu, Sarawak, Borneo before she went
G missing. It was also alleged that on 30 November 2003, the Indonesia Navy located the vessel abandoned in the Java Sea near Surabaya in Indonesia. Attempts to locate the crews and the goods proved futile. As a result of the loss, the plaintiff made a claim under the policy which was rejected by the defendant for
H breach of warranties by the plaintiff. The issues that arose: (i) whether the vessel was a classified vessel as set out in Institute Classification Clause and if not what was the consequence in respect of the liability of the defendant under the policy; (ii) whether the goods were legally imported; (iii) whether the vessel
I was rendered unseaworthy on grounds that the vessel did not have a full complement of qualified crew, by sailing beyond the

plying limits imposed by the government and the fact that one Mr Lau Kah Ding, a common director of the plaintiff and Perkapalan Kuasa Sdn Bhd, the company owing the vessel, would be privy to the acts of the shipowner and the plaintiff's breaches.

Held (allowing plaintiff's claim):

(1) The policy was an all risk policy. In the case at hand, both sides conceded that there was no proof as to the actual cause of loss. The only inference could be that the crew had pilfered the goods and abandoned the vessel. Such risk of loss was covered by an all risk policy unless it was excluded in the exclusion clauses. It was the duty of the defendant to show to the court that the exclusion clauses applied to the factual matrix in this case. (para 7)

(2) The purpose of the Institute Classification Clause 1 August 1997 was to determine the 'marine transit rates' between the plaintiff and the defendant for goods carried in vessel belonging to those classified therein. Nowhere in that clause was it stated that for the policy to be valid the vessel carrying the goods must be one of those classified vessels. The proviso specially provides that goods carried by vessels not classified in that clause were covered by the policy. Hence the defendant's contention on this issue was without merit. (para 10)

(3) The burden of proof lay on the defendant to prove that the plaintiff was involved illegally in exporting sawn timber from Indonesia (s. 101 Evidence Act 1950). They have failed miserably in that they have not produced any evidence, documentary or otherwise, that the plaintiff had breached any Indonesian laws. One Clement Chong, the adjuster (PW2) who was commissioned by the defendant to investigate the claim, in his evidence, specifically said that the vessel had obtained the relevant port clearance from Pontianak and did set sail from there. (para 11)

(4) It was the plaintiff's evidence that the crew members were competent and the report of PW2 did not indicate otherwise. It was bewildering that the defendant when issuing the policy and accepting the premium never requested the plaintiff to provide the qualifications of the crew or disclose to the plaintiff that this information was a pre-condition to the validity of the

policy and it was only now that they have seen it fit to request for such information. Furthermore, the cause of the loss of the goods was never related to the competency of the crew of the vessel. Hence, this contention should be rejected. (para 17)

(5) The vessel had a shipping license issued by the relevant authority and it did not prohibit the vessel from sailing to international waters. Any breach of the conditions of the load line certificate results in a penalty and in any event there was no evidence that the relevant authority had imposed any penalty for breach of the conditions of the load line certificate. Also, there was no evidence that the vessel was unseaworthy. Further, there was no evidence to conclude that the plaintiff was privy of the unseaworthiness of the vessel. There was no evidence of knowledge in the evidence. Hence this contention failed. (paras 18 & 19)

(6) Whether this claim could succeed depended solely on whether the plaintiff had brought its claim within the terms of the policy. The plaintiff had done so, and its claim was in fact corroborated by the report of the adjuster in PW2's final report which had not been discredited by the defendant. (para 20)

[Order accordingly.]

Case(s) referred to:
British and Foreign Marine Insurance Co v. Gaunt [1921] All ER 450 ***(refd)***
Compannia Maritima v. The Oceans Mutual [1976] 3 All ER ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 101
Marine Insurance Act 1906, s. 39

Other source(s) referred to:
JK Goodacre, *Marine Insurance,* p 123

For the plaintiff - George Lim; M/s Batternberg & Talma
For the defendant - Winnie Chan; M/s David Allan Sagah & Teh Advoc

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah J:

The Proceedings

[1] The plaintiff's claim is for loss of goods in the sum of RM396,000 under a Marine Cargo Policy taken out with the defendant which disclaims liability on the ground that the plaintiff had breached certain conditions of the policy rendering it unenforceable.

Undisputed Facts

[2] The defendant by a Marine Cargo Policy (the policy) provided insurance coverage in respect of goods valued at RM400,000 carried on board motor vessel M.V "Kuasa Jaya No.1" (the vessel). On at or about 23 September 2003, the plaintiff alleged that the vessel carrying 428.4804 cubic meters of sawn timbers (goods) was sailing from Pontianak, Kalimantan, Indonesia and heading towards Sibu, Sarawak, Borneo before she went missing. It was also alleged that on 30 November 2003, the Indonesia Navy located the vessel abandoned in the Java Sea near Surabaya in Indonesia. Attempts to locate the crew and the goods proved futile. As a result of the loss, the plaintiff made a claim under the policy which was rejected by the defendant for breaches of warranties by the plaintiff.

Issues

[3] Having read the submissions of counsels and the evidence adduced, it is my view that the following issues require my deliberation:

1. Whether the vessel is a classified vessel as set out in Institute Classification Clause 1 August 1997 and if not what is the consequence in respect of the liability of the defendant under the policy?
2. Whether the goods were legally imported?
3. Whether the vessel was rendered unseaworthy on the grounds that:
   a: The vessel did not have a full complement of qualified crew.

A b: By sailing beyond the plying limits imposed by the government.

c: Mr. Lau Kah Ding is a common director of the plaintiff and Perkapalan Kuasa Sdn. Bhd. the company owning the
B vessel and would be privy to the acts of the ship-owner and the plaintiff's breaches in:

i. special condition (iii)(a);

ii. clause 5 of the Institute Cargo cl. (A) 1 January
C 1982;

iii. s. 39 of the Marine Insurance Act 1906

[4] Before I consider the counsels' submissions on the issues let me say that I agree with Mr. George Lim, counsel for the plaintiff,
D that the policy is an all risk policy as can be gathered from cl. 1 which reads as follows:

> Clause 1. This insurance covers all risks of loss of or damage to the subject-matter insured except as provided in Clauses 4, 5, 6 and 7 below.

E

[5] An 'all risk' policy is defined in Marine Policy, J.K Goodacre on "Marine Insurance" at p. 123 as follows:

> Under an "all risk" cover, the class of insured perils is so wide
F that an assured is considered to have discharged his burden of proof by showing that the cause of loss was one insured against, although he is unable to point to a particular cause, provided it has occurred during the currency of the Policy.

[6] Lord Birkenhead LC in the House of Lord cases of *British*
G *and Foreign Marine Insurance Co v. Gaunt* [1921] All ER 450 made the same observation:

> The damage proved was such as did not occur, and could not be expected to occur, in the course of a normal transit. The inference remains that it was due to some abnormal circumstance, some
H accident or casualty. We are, of course, to give effect to the rule that the plaintiff must establish his case, that he must show that the loss comes within the terms of his policies; but where all risks are covered by the Policy and not merely risks of a specified class or classes, the plaintiff discharges his special onus when he
I has proved that the loss was caused by some event covered by the general expression, and he is not bound to go further and prove the exact nature of the accident or casualty which, in fact, occasioned his loss.

[7] In the case at hand, both sides concede that there is no proof as to the actual cause of loss. The only inference could be that the crew had pilfered the goods and abandoned the vessel. Such risk of loss in my view is covered by an all risk policy unless it is excluded in the exclusion clauses and on the authority of *British and Foreign Marine Insurance Co v. Gaunt (supra)*, it is then the duty of the defendant to show to the Court that the exclusion clauses apply to the factual matrix in this case. I will now examine whether the defendant had done that by discussing the issues listed earlier.

Issue 1

[8] Miss Winnie Chan, counsel for the defendant, submits that the plaintiff had breached the Institute Classification Clause 1 August 1997 which amounted to a breach of warranty resulting in a discharge of liability of the defendant under the policy.

[9] Institute Classification Clause (1 August 1997) reads as follows:

> The marine transit rates agreed for this insurance apply only to cargoes and/or interests carried by mechanically self-propelled vessels of steel construction, classed as below by one of the following classification societies:
>
> Lloyd's Register ... I OOAI or B.S.
> American Bureau of Shipping ... +A1
> Bureau Veritas ... 1 313 E+
> China Classification Society ... *CSA
> Germanischer Lloyd ... +1 00 A5
> Korean Register of Shipping ...+KRS I
> Maritime Register of Shipping ... KM*
> Nippon Kaiji Kyokai ... NS*
> Norske Veritas ... +1 Al
> Registro Italiano ... *100-A-I .1.
>
> Provided such Vessels are:
>
> a) (i) not bulk and/or combination carriers over 10 years of age;
>
> (ii) Not mineral oil tankers exceeding 50,000 GRT which are over years of age.
>
> b) (i) not over 15 years of age; OR

A (ii) over 15 years of age but not over 25 years of age and have established and maintained a regular pattern of trading on an advertised schedule to load and unload at specified ports.

B Chartered vessels and also vessels under 1000 G.R.T. which are mechanically self-propelled and of steel construction must be classed as above and not over the age limitations specified above.

The requirements of the institute classification clause do not apply to any craft, raft or lighter, used to load or unload the vessel, C whilst they are within the port area.

Cargoes and/or interests carried by mechanically self-propelled vessels not falling within the scope of the above are held covered and on conditions to be agreed.

D **[10]** With respect the purpose of the clause is to determine the "marine transit rates" between the plaintiff and the defendant for goods carried in vessel belonging to those classified therein. Nowhere in that clause states that for the policy to be valid the vessel carrying the goods must be one of those classified vessels. E As rightly pointed out by Mr. Lim the proviso specially provides that goods carried by vessels not classified in that clause are covered by the policy. Hence I find that the defendant's contention to be without merit.

Issue 2

F

[11] The defendant's contention here is that for the plaintiff to export sawn timbers from Indonesia export permits are required and since no permits are produced in court the plaintiff was illegally exporting sawn timbers from Indonesia. As this is an G assertion by the defendant, the burden of proof lies on them to prove that the plaintiff was involved illegally in exporting sawn timber from Indonesia (see s. 101 of the Evidence Act). With respect they have failed miserably in that they have not produced any evidence, documentary or otherwise, that the plaintiff had H breached any Indonesian laws. Mr. Clement Chong, the adjuster (PW2), who was commissioned by the defendant to investigate the claim, in his evidence, specifically said that the vessel had obtained the relevant port clearance from Pontianak and did set sail from there. It is significant that PW2 was commissioned by the I defendant and he had prepared a report which confirmed that the plaintiff's claim was legitimate.

[12] Hence I also find this contention to be without merit.

Issue 3

[13] To recap, this issue raises three points:

i. The plaintiff's failure to submit a full complement of qualified crew had rendered the vessel unseaworthy.

ii. By sailing the vessel beyond the plying limits the plaintiff had rendered the vessel unseaworthy.

iii. The plaintiff was privy to such unseaworthiness.

[14] This issue concerns one of the exemption clauses namely cl. 5 which states as follows:

> 5.1 In no case shall this insurance cover loss damage or expense arising from unseaworthiness of vessel or craft, unfitness of vessel craft conveyance container or lift van for the safe carriage of the subject matter insured where the Assured or their servants are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein.
>
> 5.2 The underwriters waive any breach of the implied warranties or seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the assured or their servants are privy to such unseaworthiness or unfitness.

[15] Clause 5 talks of unseaworthiness of the vessel and how that relates on the failure of the plaintiff to submit the full complement of the crew has not been fully explained by the defendant. It is the plaintiff's evidence that the crew members were competent and the report of PW2 did not indicate otherwise. It is bewildering to this court that the defendant when issuing the policy and accepting the premium never requested the plaintiff to provide the qualifications of the crew or disclose to the plaintiff that this information is a pre condition to the validity of the policy and it is only now that they have seen it fit to request for such information. Furthermore the cause of the loss of the goods was never related to the competency of the crew of the vessel. Hence I reject this contention.

[16] This brings me to the next point and that is whether the fact that the vessel was used outside the territorial limits renders it unseaworthy. Again I see no merit in the argument as the policy only requires that the vessel to be seaworthy and the defendant

A is required to prove that the vessel was in fact unseaworthy. It is undisputed that the vessel has a shipping license issued by the relevant authority and it does not prohibit the vessel from sailing to international waters. As rightly pointed out by Mr. Lim, any breach of the conditions of the load line certificate results in a B penalty and in any event there is no evidence that the relevant authority had imposed any penalty for breach of the conditions of the load line certificate.

[17] As for the third and final point, it can be said it is a non C starter as there is no evidence that the vessel is unseaworthy.

[18] Be that as it may, even if I find that the vessel had been unseaworthy it does not help the defendant as it cannot rely on section 5.2 of the policy as I cannot find any evidence to conclude that the plaintiff was privy of the unseaworthiness of the D vessel. Miss Chan attempted to tie the plaintiff's knowledge to the fact that Mr. Lau Kah Ding is a Director of the plaintiff as well as the Perkapalan Kuasa Sdn Bhd, the company that owned the vessel. What 'privy' means is defined in the cited case of *Compannia Maritima v. The Oceans Mutual* [1976] 3 All ER at E p. 251 d to h where Lord Denning said:

> This historical survey shows to my mind that, when the old common lawyers spoke of a man being 'privy' to something being done, or of an act being done' with his "privity", they F meant that he knew of it beforehand and concurred in it being done. If it was a wrongful act done by his servant, then he was liable for it if it was done 'by his command or privity', that is with his express authority or with his knowledge and concurrence. 'Privity' did not mean that there was any willful misconduct by him, but only that he knew of the act beforehand and concurred G in it being done. Moreover, 'privity' did not mean that he himself personally did the act, but only that someone else did it and that he knowingly concurred in it. Hence, in the later Merchant Shipping Acts, the owner was entitled to limit his liability if the act was done without his 'actual fault or privity'. Without his H 'actual fault' meant without any actual fault by the owner personally. Without his 'privity' meant without his knowledge or concurrence. Such is, I think, the meaning we should attach to the word 'privity' in s. 39(5). If the ship is sent to sea in an unseaworthy state, with the knowledge and concurrence of the assured personally, the insurer is not liable for any loss attributable I to unseaworthiness that is to unseaworthiness of which he knew and in which he concurred. To disentitle the ship-owner, he must, I think, have knowledge not only of the facts constituting the

> unseaworthiness, but also knowledge that those facts rendered the ship unseaworthy, that is not reasonably fit to encounter the ordinary perils of the sea. And when I speak of knowledge, I mean not only positive knowledge, but also the sort of knowledge expressed in the phrase 'turning a blind eye'. If a man, suspicious of the truth, turns a blind eye to it, and refrains from enquiry - so that he should not know it for certain-then he is to be regarded as knowing the truth. This 'turning a blind eye' is far more blameworthy than mere negligence. Negligence is not knowing the truth is not equivalent to knowledge of it.
>
> The knowledge must also be the knowledge of the ship-owner personally, or his alter ego, or in the case of a company, its head men or whoever may be considered their alter ego. It may be inferred from evidence that a reasonably prudent owner in his place would have known the facts and have realized that the ship was not reasonably fit to be sent to sea. But, if the ship-owner satisfies the court that he did not know the facts or did not realise that they rendered the ship unseaworthy, then he ought not to be held privy to it, even though he was negligent in not knowing.

[19] His Lordship talks of personal knowledge and I see no such evidence of knowledge in the evidence. Hence this contention also fails.

Conclusion

[20] Whether this claim can succeed depends solely on whether the plaintiff had brought its claim within the terms of the policy. In my view and for reasons stated above, the plaintiff has done so and its claim is in fact corroborated by the report of the adjuster in PW2's final report which has not been discredited by the defendant. Accordingly I make the following orders:

i. Judgment to the plaintiff in the sum of RM396,000;

ii. Interest at the rate of 4% per annum from 26 September 2003 till the date of judgment;

iii. Interest at the rate of 8% per annum from the date of judgment till full payment; and

iv. Cost to be taxed unless agreed to the plaintiff.